2006

Christensen and Jensen, P.C., Christensen, Jensen, and Powell, P.C. v. Barrett and Daines, W. Scott Bareett, Barrett and Brady : Brief of Appellee

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE UTAH SUPREME COURT

CHRISTENSEN & JENSEN, P.C., FKA CHRISTENSEN, JENSEN & POWELL, P.C.,	)	CASE NO. 2006-1044-SC
PLAINTIFFS/APPELLEES,	)	DISTRICT CT. NO. 030916399
VS.	)	
BARRETT & DAINES; W. SCOTT BARRETT, FKA BARRETT & BRADY,	)	
DEFENDANTS/APPELLANTS.	)	

BRIEF OF APPELLEES

APPEAL FROM A DECISION OF THE THIRD JUDICIAL DISTRICT COURT
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1. In a legal malpractice action, did the district court correctly hold that the appellants could not establish causation because their damage claim was dependent upon the flawed legal conclusion that this Court would have vacated an important legal precedent based on agreement of the parties, where no external events rendered the precedent inequitable as to the parties? (R. 361, 729.) "'Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented.'" *Peterson v. The Sunrider Corp.*, 2002 UT 43, ¶ 13, 48 P.3d 918 (quoting *Ward v. Intermountain Farmers Ass'n*, 907 P.2d 264, 266 (Utah 1995)).

2. Did the district court correctly hold that, where the settlement offer upon which the action was based required vacatur of an opinion in the case being settled and the named plaintiff refused to consent to vacatur, the failure of the settlement offer to mature into an agreement was not caused by the alleged inadequate disclosure of the terms of settlement to another client who was not a named party in the case but stood to benefit from its settlement? (R. 360, 726.) "'Because entitlement to summary judgment is a question of law, we accord no deference to the trial court's resolution of the legal issues presented.'" *Id.*

3. As a matter of public policy, in a legal malpractice action in which independent grounds for punitive damages do not exist against the lawyer, may the plaintiff nevertheless recover punitive damages which in the underlying action would have been available as a punishment against a third party? (R. 362.) The sufficiency of a party's al-

legations to support a claim for damages is a question of law reviewed for correctness. *Utah Dept. of Transportation v. Ivers*, 2005 UT App 519, ¶ 9, 128 P.3d 74.

4. Did the trial court abuse its discretion in concluding that, from all the facts and circumstances of the case, a fair and equitable estimate of the value of Scott Barrett's contribution to the *Campbell v. State Farm* litigation was $25,000? (R. 2087, 2102 ¶ 22.) In cases of equity, a trial court's findings of fact are reviewed for clear error, and "significant deference" is accorded the court's balancing of the facts and equities. *Parduhn v. Bennett*, 2005 UT 22, ¶ 39, 112 P.3d 495.

STATEMENT OF THE CASE

NATURE OF THE CASE

This suit began as a declaratory judgment action filed by Christensen & Jensen, P.C., seeking a determination by the district court as to how attorney fees earned in connection with the *Campbell v. State Farm* litigation should be divided between it and W. Scott Barrett. (R. 2.) The defendants, along with Robert Slusher, counterclaimed against Christensen & Jensen and L. Rich Humpherys alleging legal malpractice and breach of fiduciary duty (hereinafter collectively "the malpractice action") arising out of the rejection of a conditional settlement offer made by State Farm after the issuance of this Court's October 2001 opinion in the *Campbell* case. (R. 8.)

COURSE OF PROCEEDINGS BELOW

The lower court issued a Memorandum Decision granting summary judgment in favor of Christensen & Jensen and Humpherys dismissing the malpractice claims on

January 3, 2006. (R. 988-94.) The counterclaimants filed a motion to reconsider (R. 1458), which was denied in an order entered October 10, 2006. (R. 2093.)

Meanwhile, the declaratory judgment action proceeded to trial on April 4-6, 2006. Prior to trial, the parties stipulated that, if the jury found that no enforceable contract existed between C & J and Barrett, or that a contract existed but it had been breached by Barrett, the trial court would then decide in an equitable proceeding the amount of fees that would fairly compensate Barrett for his contributions to the *Campbell* case. (Findings of Fact and Conclusions of Law, R. 2098 ¶ 4; see also R. 2084-85, Memorandum Decision; R. 2138, pp. 10-11.)

The jury found that a valid contract existed between Christensen & Jensen and Barrett to divide fees in the *Campbell* case one-third to Barrett and two-thirds to Christensen & Jensen. The jury found, however, that Barrett had failed to perform his obligations under the contract, and that Christensen & Jensen did not unreasonably prevent him from doing so. (R. 1748-49.)

Pursuant to their earlier stipulation, the parties then briefed Barrett's claim for equitable relief. The trial court resolved the claim in a Memorandum Decision (R. 2083-2089), Findings of Fact and Conclusions of Law (R. 2097-2103), and a judgment (R. 2105-2106) entered October 13, 2006, awarding Barrett $25,000 on equitable grounds. Christensen & Jensen paid the judgment in full, without prejudice to Barrett's right to appeal. (R. 2122-23.) The appellants filed a Notice of Appeal on November 8, 2006. (R. 2107.)

STATEMENT OF FACTS

On May 22, 1981, Curtis Campbell, Robert Slusher, and Todd Ospital were involved in an automobile accident in Sardine Canyon. Ospital died and Slusher was injured in the accident. This event, and subsequent actions of Mr. Campbell's liability insurer, State Farm, have been before this Court and the Court of Appeals several times. *See Slusher v. Ospital*, 777 P.2d 437 (Utah 1989) (affirming the auto accident verdict); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130 (Utah Ct. App.), *cert. denied*, 853 P.2d 897 (Utah 1992) (reversing dismissal of the Campbells' claims); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89, 65 P.3d 1134, *rev'd*, 538 U.S. 408 (2003) (affirming jury verdict against State Farm); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, 98 P.3d 409 (determining maximum permissible punitive damage award upon remand from U.S. Supreme Court). As set forth in those opinions, the basic events that led to the punitive damage award against State Farm are well known.

In September 1981, Slusher sued Campbell and the estate of Ospital for personal injuries sustained in the accident. Ospital's estate cross-claimed against Campbell for wrongful death. Ospital's estate and parents were represented by Christensen & Jensen, and Slusher was represented by Barrett. In September 1983, based on a jury verdict, Ospital's estate and Slusher obtained net judgments against Mr. Campbell for approximately $51,000 and $133,000, respectively.

Mr. Campbell was insured by State Farm Mutual Automobile Insurance Company (State Farm) with limits of $25,000 per claim. State Farm had refused to make any settlement offer before trial, refused to satisfy the judgments after trial, and appealed the verdict. In 1989, the verdict and judgments entered by the trial court were affirmed. Thereafter, State Farm paid the full amount of the verdicts plus interest and costs.

A. Facts relating to the malpractice action.

Christensen & Jensen and Humpherys vigorously contest the aspersions and outright fabrications represented as fact by Slusher and Barrett in the court below and on appeal. Consistent with the restrictions of UTAH R. CIV. P. 56, however, appellees have assumed true herein such assertions for which citations to the record are provided.

In December 1984, during the time when State Farm was refusing to pay the judgments, Curtis Campbell, Slusher and John and Winnifred Ospital (Ospitals), parents of Todd Ospital, entered into an agreement (R. 21) which included the following terms:

a. Slusher and Ospitals agreed not to execute on their judgments against Curtis Campbell beyond any available insurance.

b. Curtis Campbell agreed to prosecute all claims he may have against State Farm.

c. Curtis Campbell would keep Slusher and Ospitals advised of the progress and status of the claims against State Farm and would not settle any claims against State Farm without the approval of Slusher and Ospitals.

d. Any recovery by Curtis Campbell from State Farm, after costs and fees, would be divided 10% to Curtis Campbell, 45% to Slusher and 45% to Ospitals.

e. Curtis Campbell would be represented by Christensen & Jensen and Scott Barrett, who would also represent Slusher and Ospitals.

Inez Campbell, Curtis Campbell's wife, was not a party to the December 1984 Agreement, but she also had claims against State Farm. In 1995, Curtis Campbell, Inez Campbell, Slusher and Ospitals agreed that the total combined recovery, if any, by the Campbells would be divided one-third to Campbells, one-third to Slusher and one-third to Ospitals. The terms of the December 1984 Agreement remained otherwise unchanged. The 1995 Agreement was documented by letter and hand written notes in 1995 and formally memorialized in a written agreement dated December 7, 2001. (R. 375). Slusher testified that the December 2001 agreement accurately reflected his understanding of the 1995 agreement. Depo. of Slusher, pp. 55-57 (R. 381-83).

From the time of the 1995 Agreement to divide all proceeds from the claims against State Farm in equal thirds to Campbells, Slusher and Ospitals, they all agreed and understood that there would be no settlement with State Farm without the unanimous approval of the Campbells, Slusher and Ospitals. See December 7, 2001 Agreement ¶ 3 (R. 354 ¶ 7); Depo. of Robert G. Slusher pp. 55-57 (R. 380-383); Depo. of John Ospital pp. 14-16 (R. 400-403); Depo. of Winnifred Ospital pp. 18-19 (R. 414-425).[1]

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[1] On appeal, Slusher claims that a conflict of interest existed among the clients that precluded Humpherys (and Barrett, too, presumably) from representing all three sets of clients, because Slusher's primary interest was money, whereas the Campbells and Ospitals were more concerned about principle. (Brief of Appellant, pp. 16-17.) While disposition of this issue is unnecessary in light of the trail court's ruling, it is uncontroverted that, with Barrett's advice, Slusher expressly agreed to the arrangement in which unanimous consent was required for acceptance of a settlement offer. There is no inherent conflict in such an arrangement, but regardless, any such conflict was waived. Moreover, as discussed *infra*, Slusher's contention would not affect the outcome in any event, as the named plaintiffs' consent was required to settle the case, and Mrs. Campbell would never have consented to the settlement offer discussed below, regardless of who represented her. Thus, any alleged "conflict" was legally immaterial.

In August 1989, the underlying action for insurance bad faith and fraud was commenced against State Farm. The plaintiffs were Curtis Campbell and Inez Campbell. Following is a time line of that litigation:

- August 1989: Complaint Filed.
- January 1991: Summary Judgment granted for State Farm.
- August 1992: Summary Judgment reversed by Court of Appeals.
- October 1995: Bifurcated trial - Phase I. Verdict finding State Farm acted in bad faith.
- June-July 1996: Bifurcated trial - Phase II (Fraud, intentional infliction of emotional distress and damages). Verdict for $2,600,000 compensatory damages and $145,000,000 punitive damages.
- September 1998: Remitittur reducing compensatory damages to $1,000,000 and punitive damages to $25,000,000. Remitittur accepted by plaintiffs. State Farm appealed. Plaintiffs cross-appealed.
- October 19, 2001: Utah Supreme Court reinstated jury verdict of $145,000,000 punitive damages and affirmed the re-mitittur with respect to compensatory damages of $1,000,000.

- April 7, 2003: U.S. Supreme Court held $145,000,000 punitive award unconstitutional and remanded to Utah Supreme Court to recalculate punitive damages.
- April 23, 2004: Utah Supreme Court held $9,018,780.75 punitive damages was maximum amount constitutionally allowed.
- October 4, 2004: U.S. Supreme Court denied State Farm's petition for certiorari.

In October 2001, shortly before this Court issued its opinion reinstating the jury's original $145,000,000 punitive damage award, State Farm made a settlement offer of $10,000,000, conditioned on settlement being accomplished and the appeal being dismissed before the Court issued an opinion. Campbells, Slusher, and Ospitals unanimously elected to reject that offer and await the opinion. Depo. of Barrett, pp. 113-15 (R. 431-34).

After the Utah Supreme Court opinion was issued on October 19, 2001, and prior to November 16, 2001, Humpherys and Michael Zimmerman, who was one of State Farm's attorneys, had several conversations. In the course of those conversations, Zimmerman asked whether Humpherys' clients would be willing to stipulate to ask the Court to vacate the Supreme Court opinion if State Farm paid "a substantial amount." Depo. of Humpherys, pp. 178-81 (R. 436-40).

On November 16, 2001, Humpherys received a settlement letter dated and mailed November 14, 2001 from Mr. Zimmerman. (R. 461.) The letter set forth a settlement proposal including the following terms:

a. State Farm would escrow $150,000,000 which would be payable upon the Utah Supreme Court vacating the opinion and decision issued on October 19, 2001.

b. Plaintiffs and their counsel would join State Farm in requesting that the Supreme Court vacate its opinion and decision.

c. The terms of the settlement proposal were confidential.

d. A response was to be provided to Zimmerman in writing by noon on Friday, November 16, 2001.[2]

On November 16, 2001, the day he received the settlement letter from Zimmerman, Humpherys discussed the proposed settlement with Inez Campbell, John and Winnifred Ospital, and Slusher by telephone. The discussions with Inez Campbell and the Ospitals occurred before noon. Slusher recalls two or three telephone conferences with Humpherys that day, but it is uncertain what time the settlement proposal was first discussed with him. Depo. of Humpherys pp. 189-207 (R. 442-59); Depo. of J. Ospital pp. 31-36 (R. 405-10); Depo. of W. Ospital pp. 34-41 (R. 418-25); Depo. of Slusher pp. 75-81 (R. 385-91).

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[2] The response deadline of November 16, a Friday, was not coincidental. State Farm's deadline to file a petition for rehearing on the October 19, 2001, opinion, was approaching. The petition was filed the following Monday, November 19.

Mrs. Campbell emphatically refused to agree to vacatur of the Supreme Court's opinion. She testified, "I remember telling Mr. Humpherys that Curtis would shoot me in the resurrection if I gave up the principles we had fought for just to get money." (R. 466 ¶ 9.) Mrs. Campbell testified that what was important to her was "that the principle of the thing that we had fought for all these years was still intact, that they were going to be exposed." I. Campbell depo., p. 73 (R. 728). In her deposition, counterclaimants' counsel explained that "vacated" means "taken away like it never happened," and Mrs. Campbell said she understood it the same way. *Id.*, p. 74 (R. 728).

Humpherys explained the term to his clients, and in response to their questions answered that it was like "paying us to keep our mouth shut." Depo. of Humpherys, p. 191 (R. 444). Mrs. Campbell testified that nothing Barrett or Slusher could have said would have caused her to change her mind. I. Campbell depo., pp. 82-83 (R. 472-73.) Both Campbells and Ospitals felt that they were being asked to "sell out principle for money." *Id.* pp. 193, 200 (R. 728).

On November 16, 2001, Humpherys explained State Farm's settlement proposal to John and Winnifred Ospital. According to them, he spent a long time discussing State Farm's proposal, they asked all the questions they had, and Humpherys explained everything to their satisfaction. They were not willing to agree to vacate the Supreme Court's opinion and therefore instructed Humpherys not to accept the offer. Depo. of J. Ospital, pp. 46-47 (R. 412-13); Depo. of W. Ospital, pp. 45-47 (R. 427-29).

There is some dispute about the exact content of the telephone conversation(s) between Humpherys and Slusher on November 16, 2001. It is, however, not disputed that one or more conversations occurred during which the State Farm settlement proposal was discussed. Slusher acknowledges that he was told Zimmerman had made an offer, that it was "around the range of $150,000,000," and that the Campbells were unwilling to accept it because of the condition that they stipulate to have the Supreme Court's opinion set aside or withdrawn. Depo. of Slusher, pp. 80, 82-83 (R. 390-93).[3]

Before noon on November 16, 2001, Humpherys faxed and hand delivered a letter to Mr. Zimmerman responding to State Farm's settlement proposal. (R. 459.) Humpherys' letter stated his clients would not stipulate to vacating the Supreme Court's opinion. (R. 486.)[4]

B. Facts relating to trial court's equitable division of attorney fees.

After the 1983 trial, either the Ospitals' or Slusher's judgments would have been enough to bankrupt the Campbells. (R. 2135, p. 326.) Because State Farm refused to pay the judgments, the options open to Slusher and the Ospitals to collect were garnishment

[3] Slusher suggests on appeal that Christensen & Jensen and Humpherys did not want to vacate the State Farm opinion because they were marketing themselves as bad faith specialists and the *Campbell* opinion would be of great value in other bad faith cases. While such allegations are assumed true per UTAH R. CIV. P. 56, a five-minute Westlaw search would reveal that the firm and Humpherys had an established reputation in litigation of bad faith cases long before 2001. Moreover, the suggestion that a lawyer would choose to give up an approximately $42 million fee on one case in order to gain an advantage in potential future cases seems rather counterintuitive.

[4] Slusher's brief misstates the content of Humpherys' letter. Slusher's brief claims: "Without review or approval by Barrett and Slusher, before noon on November 16, 2001, C & J hand delivered a letter to Mr. Zimmerman rejecting the proposed settlement and misrepresenting to Mr. Zimmerman that all of the Clients 'will not stipulate to vacating the opinion.'" (Brief of Appellants, p. 15.) Humpherys' letter did not say "all" of the clients. It said, "My clients will not stipulate to vacating the opinion," a true statement given that two sets of clients had so instructed him. (R. 486.)

and execution on the Campbells' assets. (R. 2134, p. 173.) Barrett recommended to his client, Slusher, and Humpherys recommended to his clients, the Ospitals, that they forebear such actions, and instead negotiate a deal whereby Campbell would agree to pursue claims against State Farm, and to share the recovery from such claims with Slusher and the Ospitals. *Id.*

On December 6, 1984, such an agreement was finalized. Under the December 1984 agreement, Barrett and Humpherys were jointly to represent Curtis Campbell, Robert Slusher, and the Ospitals. Each attorney was to perform roughly half of the work in pursuit of the claims against State Farm, and any fee earned was to be divided equally as well. (R. 2134, pp. 174-76, 179, 182-90; R. 2135, pp. 405-07.)

A lawsuit was initially filed against State Farm in 1986, naming the Campbells, Slusher, and the Ospitals as plaintiffs. (R. 2134, p. 193.) On a motion to dismiss filed by the defendant, the trial court held that, as a matter of law, neither Slusher nor the Ospitals had standing to pursue claims against State Farm. Accordingly, their claims were dismissed with prejudice. The Campbells' claims were dismissed without prejudice pending resolution of the auto accident appeal. (R. 2134, pp. 195-197; R. 2135, p. 416; Findings of Fact, R. 2101, ¶¶ 18-20.)

In 1989, this Court affirmed the auto accident judgment. At that time, State Farm fully paid Slusher and the Ospitals the full amount of their personal injury and wrongful death judgments, including interest and taxable costs. (R. 2134, pp. 195-96; R. 2135, pp. 414-15.) Shortly thereafter, a second complaint was filed against State Farm (hereinafter the "State Farm" case), and the *Campbell v. State Farm* saga began.

Contrary to his obligations under the 1984 agreement, Barrett did not share equal responsibility in pursuing the State Farm case. For example, Barrett did not assist with legal research, help with drafting the complaint, communicate with defense counsel or any clients other than Slusher, attend hearings on dispositive motions, participate in discovery, or even attend the depositions of Curtis and Inez Campbell, the named plaintiffs in the lawsuit. (R. 2134, p. 202; R. 2135, pp. 202, 206-08; R. 2136, pp. 479-80, pp. 530-31.)

At various times, Humpherys raised with Barrett concerns about Barrett's lack of participation in the case. Eventually, in the fall of 1990, Humpherys told Barrett that it was neither fair nor consistent with the 1984 agreement that Humpherys was having to do all the work, and that Barrett was not helping or supporting him. (R. 2134, pp. 209-10.)

Humpherys and Barrett agreed to modify the original agreement so as to share the fees two-thirds to Christensen & Jensen and one-third to Barrett, with Humpherys formally assuming the role of lead attorney. Humpherys did not expect Barrett to perform exactly 33.3 percent of the work. Rather, the two-thirds / one-third split reflected an estimate as to the amount of work each would be putting into the case. (R. 2134, pp. 211-14, 217-18.)

The jury found that Barrett did not live up to his obligations under the 1990 agreement, either. On numerous occasions, Barrett either did not comply with Humpherys' requests, or expended minimal effort in doing so. (*See, e.g.,* R. 2134, pp. 219-23; R. 2135, pp. 318-39, 327-30 (failing to develop a potential expert witness as requested by

Humpherys); R. 2134, pp. 223-28, 231-33; R. 2135, pp. 436-41 (drafting a deficient motion to compel); R. 2135, pp. 234-35, 331-33 (providing no assistance in first appeal).)

Over time, the scope of State Farm's fraud began to emerge, adding tremendously to the time and expense of the case. (R. 2134, pp. 235-37.) By 1994, Humpherys was being "overwhelmed" by tens of thousands of documents revealing a widespread scheme by the insurance company. He again raised with Barrett his frustrations with Barrett's lack of assistance. (R. 2135, pp. 242-43.) Humpherys asked Barrett to start attending and reviewing depositions, to examine documents that had been uncovered, and otherwise to assist in trial preparation, but Barrett did not do so. (R. 2135, pp. 229, 244-50, 433-36; Findings of Fact, R. 2100, ¶ 10.)

As Humpherys testified, "I was killing myself at this point in time." (R. 2135, p. 251.) Instead of assisting with *Campbell*, Barrett kept busy doing paying work for other clients. (R. 2136, pp. 481-82, 510-12.)

Preparing for trial, Humpherys was working six days a week, sometimes 15 or 16 hours a day. He realized that he could not get ready by himself, so he sought help from a senior litigator in his firm, Roger Christensen, who agreed to set aside his own case load, get up to speed on the *Campbell* case, and help Humpherys with the trial. (R. 2135, pp. 251-54.)

As noted above, the *Campbell* trial was bifurcated. The first phase took place in October 2005, resulting in a jury finding of bad faith by State Farm. An "incredibly intense" period of additional discovery, motions, and other trial preparation then commenced for the second phase (intentional torts and damages). Humpherys and Christensen & Jensen were in "the fight of our lives." (R. 2134, p. 132.) On one occasion, for example, State Farm filed 20 motions in a single day. (R. 2135, p. 265.)

The second trial lasted two months. Mr. Humpherys described a typical day as follows:

> I would get up between 3:00 and 4:00 in the morning, not because the alarm went off, I just, you know, you can't sleep when you're under that intense kind of stress. I would prepare from then until trial began which would begin at 8:00 and we would go straight with no lunch break until about 2:00 and then we would end the trial day and then we would spend the rest of the afternoon and evening preparing for the following day, during the entire trial, that was it and weekends, every minute was spent and dedicated to the trial. (R. 2135, pp. 264, 266.)

State Farm continued to file motions during the trial. Depositions and other discovery also took place, as the trial judge would conclude that State Farm had withheld evidence and order it to produce documents or witnesses mid-trial. "It was a constant state of activity and commotion." (R. 2135, pp. 266-67.)

One week into the second trial, Barrett sent Humpherys a letter offering assistance. However, Humpherys did not believe it would be in the clients' best interests to involve Barrett at that point, because Barrett did not know the witnesses, the exhibits, or basically the case. (R. 2135, pp. 267-68.) Humpherys analogized the situation to the Utah Jazz: "If I were Jerry Sloan and I had an assistant coach and he never attended the practices or seldom, wasn't participating in the game strategy, wasn't doing scouting or research on the team we're playing or the other teams and adjusting and being part of the adjusting process, I don't know whether I would ever do what Jerry does to get kicked out. . . . I wouldn't want an assistant coach that wasn't actively involved to ever run the team under those circumstances." (R. 2135, pp. 241-42.)[5]

Through the two *Campbell* trials, Christensen & Jensen incurred more than $500,000 in out-of-pocket costs, imposing significant financial strain on the firm. While hundreds of thousands of dollars were being spent on court reporters, experts, travel, and other expenses, no money was coming in from the case because the firm was on a contingency fee. The massive hours required in *Campbell* could not be spent on other matters that would generate revenue during the interim. The firm was "strapped." Shareholders at the firm went months without draws (paychecks). None of Christensen & Jensen's expenses were reimbursed until 2003. (R. 2134, pp. 191-92; R. 2135, pp. 262-63, 379; Findings of Fact, R. 2101, ¶ 13.)

Barrett had the financial ability to pay his share of the costs, but he steadfastly took the position that he had no obligation to do so. Over the life of the case, Barrett advanced only one percent of the expense incurred. (R. 2136, pp. 462, 464, 468, 536.)

Christensen & Jensen expended approximately 11,742 billable hours in the State Farm litigation. Of those hours, approximately 10,000 were attributable to Humpherys, Christensen, and a third attorney at the firm, Karra Porter. (R. 2135, pp. 274, 378-79.)

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[5] Perhaps one of the best indicators of Barrett's lack of engagement in the case is the fact that, even though in 2003 the United States Supreme Court reversed the punitive damage award in part because of the introduction of first-party bad faith evidence, at the 2006 trial in this case, Barrett did not even know the difference between first-party and third-party bad faith. (R. 2135, pp. 453-55; Findings of Fact, R. 2101, ¶ 15.)

Throughout the entire *Campbell v. State Farm* case, Barrett prepared only one pleading (the inadequate motion to compel), and attended only two depositions out of more than 90. (R. 2135, pp. 443-44; R. 2136, pp. 487-89, 549-50; Findings of Fact, R. 2100, ¶¶ 9, 10.) He did not appear as counsel in any pre-trial hearings, or at trial, and had no involvement in any of the four appeals in the case. (Findings of Fact, R. 2101-02, ¶¶ 11, 16.)

Inez Campbell testified that she never had any communications with Barrett, and that her only interaction with him was a single meeting in his office that lasted a few minutes. (R. 2135, pp. 389-391.) John and Winnifred Ospital likewise had no interaction with Barrett throughout the entire *Campbell* case. They did not even realize that Barrett was their lawyer until 2006, when their depositions were taken in this action. (R. 2135, pp. 396-397.)

SUMMARY OF ARGUMENT

A. <u>Malpractice action</u>.

The issue raised by this appeal is not whether Humpherys breached a duty to Slusher or Barrett, even though Slusher and Barrett devote a considerable portion of their brief to that subject, or whether there was a breach of contract or other label placed on the same conduct. The issue is whether a reasonable finder of fact could conclude, without resorting to speculation, that if advised differently the Campbells and the Ospitals would have accepted State Farm's offer on November 16, 2001; and whether the Court, without speculating, could conclude that the Utah Supreme Court would have vacated its 2001 opinion in *Campbell.*

In legal malpractice actions, the "but for" standard of causation applies. "The client must show that if the attorney had adhered to the ordinary standards of professional competence and had done the act he failed to do or not done the act complained about, the client would have benefited." *Harline v. Barker*, 854 P.2d 595, 600 (Utah Ct. App.), *cert. denied*, 862 P.2d 1356 (Utah 1993). The same standard applies in cases based upon breach of fiduciary duty. *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1291 (Utah Ct. App.), *cert. denied*, 919 P.2d 1208 (Utah 1996). Proximate cause issues can be decided as a matter of law "when a determination of the facts falls on either of two opposite ends of a factual continuum[:] . . . (i) when the facts are so clear that reasonable persons could not disagree about the underlying facts or about the application of a legal standard to the facts, and (ii) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law." *Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48, ¶ 32 (quoting *Harline*, 854 P.2d at 439).

In the present case, the district court correctly decided that appellants could not establish causation for two independent reasons. First, appellants' claims were based on the proposition that, but for Humpherys' alleged conduct, the State Farm settlement offer would have matured into a completed settlement agreement. In order for that to happen, the Utah Supreme Court would have been required to vacate its 2001 opinion. Whether or not the Court would have done so was a question of law in that case and thus remains a question of law in this case.

Vacatur may be an appropriate remedy where a litigant has lost the right to appeal an adverse decision because of events not of the litigant's own making. It is not appropriate, however, where a litigant has decided to "roll the dice" expecting that "an unfavorable outcome can be washed away by a settlement-related vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18, 28 (1994). "'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26 (citation omitted).

The district court correctly concluded that vacatur of this Court's 2001 *Campbell* opinion would not have been appropriate under the circumstances presented, and thus that the precondition to settlement would not have been satisfied. Accordingly, causation in the legal malpractice claim was not established.

Piling speculation upon speculation, the appellants reach the second causation point which barred recovery in this case. Even if the district court erred in holding that vacatur was not appropriate under the circumstances, Mrs. Campbell and the Ospitals adamantly refused to settle. While appellants speculate that perhaps State Farm would have settled separately with Slusher, or perhaps Slusher could have sold his interest to some third party, appellants' claim in this case was that the $150,000,000 settlement offer would have come to fruition but for the alleged legal malpractice. This required vacatur of the Supreme Court's opinion, which could not occur without the consent of Mrs. Campbell, the named plaintiff, and thus the condition could not be satisfied. This had nothing to do with the parties' unanimity agreement; rather, it was a natural result of Mrs. Campbell's status as the plaintiff in the case, and her opposition to any settlement that would result in vacatur of the opinion. The district court correctly treated these facts as an independent reason to grant summary judgment based upon absence of causation.

Finally, even if appellants were able to overcome the obstacles posed by the causation requirement, they faced yet another insurmountable legal issue: Their claim sought to recover from Mr. Humpherys a damage award intended to punish State Farm. While appellants treat this aspect of their claim as merely compensatory in the malpractice action, courts have recognized that public policy dictates otherwise because of the nature of punitive damages, and that it is inappropriate to permit the recovery of punitive damages from an attorney as a component of compensatory damages in a malpractice action. Appellants' attempt to recover from Humpherys such punitive damages, which the courts eventually decided were not properly awarded even against State Farm, was fatally flawed and rendered their counterclaim non-viable from the outset.

B. Equitable relief in declaratory judgment action.

After four days of trial, extensive briefing and argument, the trial court concluded that $25,000 represented a "fair, reasonable and equitable amount" of compensation to Scott Barrett for his contribution to the *Campbell v. State Farm* litigation. (R. 2087, R. 2102 ¶ 22.)

On appeal, Barrett makes no effort to marshal the evidence in support of that finding, which is grounds in itself to affirm the judgment. Moreover, the objections raised by Barrett to the award are insufficient on their face. Barrett's contention that the trial court erred by not assigning specific dollar values to each of his subsidiary findings is not only inconsistent with Barrett's own argument below, which urged the consideration of intangible factors, but also with the flexible nature of equitable proceedings.

Equally without merit is Barrett's argument that the trial court abused its discretion by failing to award him the same amount of money to which he would have been entitled had he met his obligations under the 1990 contract. If Barrett had fulfilled his obligations, he would have received his one-third from the jury – indeed, this declaratory judgment suit would not have been necessary in the first place. It was not an abuse of discretion for the trial court to decline to award an amount measured by a contract that a jury already found that Barrett had breached.

ARGUMENT

I. APPELLANTS FAILED TO ESTABLISH, WITHOUT SPECULATION, THAT BUT FOR THE ALLEGED MALPRACTICE A REASONABLE LIKELIHOOD EXISTED THAT APPELLANTS WOULD HAVE BENEFITED.

The issue before the district court on the motion for summary judgment was whether or not the appellants could prove causation. As the court held in *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283 (Utah Ct. App.), *cert. denied*, 919 P.2d 1208 (1996):

> The standard of causation for legal malpractice, like legal malpractice law generally, has grown in the context of actions based on negligence. We must now determine whether the same standard of causation applies to legal malpractice actions based on breach of fiduciary duty. A vital rule of legal malpractice actions is that the alleged wrong of the attorney must proximately cause the client's injury. Although breach of fiduciary duty actions concern different wrongs from negligence actions, the same standard of causation applies whether the alleged wrong is a negligent act, a fiduciary breach, or even a contractual breach. Therefore, the standard of

> causation for a legal malpractice action based on breach of fiduciary duty is the same as that for a legal malpractice action based on negligence.
>
> In Utah, causation or the connection between fault and damages in legal malpractice actions "cannot properly be based on speculation or conjecture." To prevail in legal malpractice actions, clients must establish actual cause—that but for the attorney's wrong their loss would not have occurred—and proximate cause—that a reasonable likelihood exists that they would have ultimately benefited.

909 P.2d at 1291. In addition to the traditional proximate cause analysis, a "but for" standard for causation applies in legal malpractice cases:

> We previously have distilled the standard for causation in legal malpractice actions to the following: "The client must show that if the attorney had adhered to the ordinary standards of professional *competence and had done the act he failed to do or not done the act complained about*, the client would have benefited." Of course, that statement grows from a legal malpractice claim based on negligence. Although the burden of establishing causation is the same regardless of whether the cause of action is based on negligence or breach of fiduciary duty, we offer the following statement in summary and for the sake of clarity: In legal malpractice actions based on breach of fiduciary duty, clients must show that if the attorney had adhered to the ordinary standards of professional *conduct and had not breached fiduciary duties*, the client would have benefited.

Id. (quoting *Harline v. Barker*, 854 P.2d 595, 600) (emphasis in original). Finally, the court stated:

> Insofar as the trial court applied a standard of causation that required plaintiffs to establish that but for defendant's breach of fiduciary duty a reasonable likelihood existed that defendant would have benefited, the trial court was correct.

Id. at 1291-92.

Appellants rely heavily on rote statements from the courts that proximate cause is generally an issue of fact. While this is certainly true as a general proposition, the general proposition does not preclude a court from deciding questions of actual causation when there is no reasonable basis upon which a jury could find causation. *House v. Armour of America, Inc.*, 886 P.2d 542, 551-52 (Utah Ct. App. 1994), *aff'd*, 929 P.2d 340 (Utah 1996). *Accord, Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48, ¶¶ 25, 32.

Slusher's brief is replete with speculative assertions: There was a "possible" way to "approach" a finance company that "could have" taken the form of an assignment or sale of Slusher's interest in the Campbells' recovery. Christensen & Jensen "may" have been able to negotiate an exception to the vacatur condition (even though that was State Farm's primary goal in offering to settle). Mrs. Campbell and the Ospitals "may have" chosen to accept the offer if they had a different understanding of vacatur. Slusher might have been able to "seek" an individual settlement. "Surely" Christensen & Jensen could have negotiated "some" guaranteed money in exchange for agreeing to join the motion to vacate, etc. (Brief of Appellant, pp. 14, 15, 42, 43.)

There is no evidence in the record demonstrating a reasonable likelihood that any of these hypotheticals would have come to fruition. Slusher adduced no evidence below that State Farm or a finance company would in fact have made an unconditional offer for his interest alone, that the offer would have exceeded the approximately $3 million that he ultimately recovered from the State Farm case, or that Slusher and his personal attorney could not have obtained the very same result by making inquiries themselves between the October 19, 2001, opinion and the U. S. Supreme Court's grant of *certiorari* on June 30, 2002.[6]

While in their brief appellants posit a string of possibilities that might have occurred had parties acted differently or had different motivations, appellants' case is more narrow: The Amended Counterclaim was limited to the allegation that, but for the alleged malpractice, the parties would not have rejected State Farm's $150,000,000 settlement offer:

> C&J and LRH breached their fiduciary duty by failing to disclose any terms of the $150,000,000 State Farm settlement offer (the Settlement Offer letter) to Barrett, prior to rejecting the offer. (Amended Counterclaim, ¶ 39 (R. 322).)
>
> But for the withholding of the material terms of the $150,000,000 offer, Slusher would have accepted the offer. (Amended Counterclaim, ¶ 56 (R. 326).)
>
> As a proximate cause of C&J's and LRH's negligence, Slusher was damaged in the amount of his pro-rated share of the settlement as proposed by State Farm. (Amended Counterclaim, ¶ 57 (R. 326).)

Thus, the issue before the district court was whether, but for the alleged malpractice, a reasonable likelihood existed that the State Farm case would have settled for $150,000,000. The district court correctly held that appellants were unable to establish that reasonable likelihood for two reasons: First, the State Farm offer was expressly conditioned on vacatur of the Utah Supreme Court's opinion. The district court treated that

[6] Even the opinion of Slusher's "expert" witness Victor Lund was only that any major corporation would have agreed to "undertake such negotiations" and "would have been very interested in negotiating a settlement," and "may have" been willing to trade off certain aspects of their offer. (R. 1473-74.) Tellingly, no State Farm representative testified that such an offer by Slusher would have been accepted.

issue as a legal, rather than factual, issue, and ruled that there was not a reasonable likelihood that the Supreme Court would have vacated its opinion. Second, in order for the condition of vacatur to have been satisfied, unanimous consent of all plaintiffs would have been required, regardless of what the agreement between the plaintiffs said, for the obvious reason that no binding stipulation to that condition could have been entered without Campbells' consent. Those two obstacles to appellants' recovery are discussed in more detail below.

II. EVEN IF CAUSATION WERE OTHERWISE ESTABLISHED, THE CONCLUSION THAT THE SUPREME COURT WOULD HAVE VACATED ITS OPINION IS SPECULATIVE.

State Farm's offer was conditioned not only on the plaintiffs stipulating to vacatur, but explicitly on the Utah Supreme Court actually vacating its October 19, 2001, opinion in *Campbell*. In order to establish a reasonable likelihood that the State Farm case would have settled for $150,000,000, Slusher and Barrett must therefore establish that this Court would have vacated its opinion.

A. *The Question Whether Vacatur Would Have Been Granted Is Not a Factual One, But Rather Is a Legal Question for Resolution By the Court.*

In the district court, appellants submitted affidavits of legal experts stating that in their opinion the Utah Supreme Court would have granted the motion for vacatur (although neither cited any experience on the subject). The district court correctly recognized, however, that whether the Court would have granted vacatur is a question of law, not of fact. Issues that were questions of law in the underlying case retain that character in the legal malpractice action. *See* 4 R. Mallen and J. Smith, LEGAL MALPRACTICE

§ 33.12 at pp. 117-18 (2005) (footnotes omitted); *Turner*, 2007 UT 48, ¶ 36 (determining as a matter of law how trial court should have ruled on legal issue); *Chocktoot v. Smith*, 280 Or. 567, 571 P.2d 1255, 1258 (1977) (*en banc*) ("with respect to an issue of law in the earlier case, the issue in the malpractice case is what the outcome should have been if the issue had been properly presented"); *Charles Rinehart Co. v. Winiemko*, 444 Mich. 579, 513 N.W.2d 773, 779-80 (1994); *Dan Nelson Constr., Inc. v. Nodland & Dickson*, 608 N.W.2d 267, 272 (N.D. 2000) (holding that the question whether an appeal would have been successful if the defendant lawyer in a malpractice case had perfected the appeal "presents a question of law for the court to decide"); *Martin v. Hall*, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971).

The Court in the case at bar can imagine the confusion of a jury as lawyers cross-examine lawyer experts by confronting them with various legal precedents and policy considerations that may not be consistent with their expert opinions. Jurors are not equipped to analyze such questions or to resolve such disagreements, and they should not be called upon to do so. Because predicting what this Court would have done in response to a motion to vacate an already issued opinion is a legal question, the affidavits of counterclaimants' experts were not an impediment to summary judgment, and the district court was correct in resolving the probability of vacatur as a matter of law.

B. *The Court Correctly Decided That Vacatur Would Not Have Been Granted.*

Courts do not routinely vacate their opinions or those of lower courts. In fact, a considerable body of law has been developed concerning the issue of vacatur. In response to attempts by well-heeled litigants to gamble on, and then erase, unfavorable precedents (precisely the type of behavior attempted by State Farm in the underlying case here), the courts have held that only extraordinary circumstances will justify vacatur of a court's decision in connection with settlement.

The leading case on the subject, *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18 (1994), was issued by the United States Supreme Court in 1994. In that case, the Court of Appeals had ruled against the plaintiff bank concerning the availability of an exception to the automatic stay in bankruptcy. While the case was pending at the Supreme Court, the parties settled. As part of the settlement, the bank asked the Court to vacate the decision of the Court of Appeals, presumably to erase the unfavorable precedent the case had established in the Ninth Circuit. The Supreme Court, however, declined to do so. Instead, it distinguished between cases where the appellant, through happenstance, has been deprived of the opportunity to appeal an adverse precedent, and those cases where the appellant has voluntarily mooted the case by settlement.

As an example of the former category of cases, the court cited *United States v. Munsingwear*, 340 U.S. 36 (1950), in which the government had sued Munsingwear for violation of a price control regulation. The government had lost and had appealed. While the appeal was pending, the commodity at issue was decontrolled, which rendered the case moot. However, because the mooting of the case had occurred by reason of circumstances beyond the government's control, thus depriving it of the opportunity to appeal an adverse ruling, the Court decided that vacatur was appropriate. 340 U.S. at 40.

In contrast, in *U.S. Bancorp*, mootness was a result of voluntary settlement, so it did not occur by happenstance or by circumstances outside the appellant's control. The Court reasoned:

> The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is true when mootness results from unilateral action of the party who prevailed below. Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice. The denial of vacatur is merely one application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."

513 U.S. at 25 (citations omitted). The Court described a strong public policy against vacatur under such circumstances: "'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26 (citation omitted).

Finally, in a holding that seems quite applicable here, the Court noted that vacatur in the context of settlement would facilitate litigants "rolling the dice" if they felt there was no real risk that adverse precedent might be established:

> [W]hile the availability of vacatur may facilitate settlement after the judgment under review has been rendered and certiorari granted (or appeal filed), it may deter settlement at an earlier stage. Some litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.

Id. at 27-28. The Court therefore held that, except in cases of "exceptional circumstances," "mootness by reason of settlement does not justify vacatur of a judgment under review." The Court concluded by noting that "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur." *Id.* at 11.

In a case that predated *U.S. Bancorp*, the Tenth Circuit (speaking on behalf of all active judges in the circuit) also held that public policy weighs strongly against vacatur by reason of settlement:

> The furthering of settlement of controversies is important and desirable, but there are significant countervailing considerations which we must also weigh. A policy permitting litigants to use the settlement process as a means of obtaining the withdrawal of unfavorable precedents is fraught with the potential for abuse. We agree with the Seventh Circuit that "an opinion is a public act of the government, which may not be expunged by private agreement." "When the parties' bargain calls for judicial action, . . . the benefits of settlement to the parties are not the only desiderata." "The precedent, a public act of a public official, is not the parties' property." Moreover, the reasoning in the published opinion "may be helpful to other courts to the extent that it is persuasive." We agree with Judge Easterbrook's view that the parties "are not free to contract about the existence of these decisions."

Oklahoma Radio Associates v. FDIC, 3 F.3d 1436, 1444 (10th Cir. 1993). *See also Norman I. Krug Real Estate Investments, Inc. v. Praszker*, 22 Cal. App. 4th 1814, 28 Cal. Rptr. 2d 498, 506 n.2 (1994) (holding, in a pre- *U.S. Bancorp* decision, that "an appellate court should not vacate a lower court opinion where the appellant, having lost below and desiring to avoid the collateral estoppel effects of the adverse judgment, causes the appeal to become moot"); *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 384 (2d Cir. 1993) (granting vacatur to facilitate settlement would allow "a party with a deep pocket" to eliminate a judgment it dislikes "simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate").

> Given this background of deference to majority common law, vacatur becomes an important litigation tool, particularly for institutional litigators who must return to court many times with the same arguments. When a court rejects the arguments of institutional litigators such as Jackson, an insurance company, the institutions are dealt a crippling blow not only in the case at bar but in future litigation. Vacatur allows disappointed litigators effectively to rewrite history. Vacatur allows them to control the direction and content of the jurisprudence—to weed out the negative precedent and preserve the positive—and create an artificially weighty and one-sided estimate of what comprises "the case law."

Benavides v. Jackson Nat. Life Ins. Co., 820 F. Supp. 1284, 1289 (D. Colo. 1993).[7]

In the case at bar, the district court properly ruled that no reasonable likelihood existed that this Court, having issued an 80-page opinion that exhaustively considered important aspects of federal and state law regarding punitive damages, would allow the parties to wipe that precedent from the books. Wholly apart from those issues, the opinion also resolved several other important questions of state law, including (1) what standard of review applies to jury and trial court findings on punitive damages under state law (de novo); (2) standards of admissibility of expert testimony in insurance cases; (3) whether general damages are available in fraud cases (yes, abrogating *Turner v. General Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah Ct. App. 1992)); (4) standards of admissibility of

[7] In the lower court, appellants cited two cases in support of their claim that vacatur is commonly granted and readily available if the parties simply ask. Their cases, however, do not support that proposition. In the first case, *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149 (2d Cir. 1998), the court applied *U.S. Bancorp* and found exceptional circumstances to exist. 150 F.3d at 152. The other case, *Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2d Cir. 1989), predated *U.S. Bancorp*.

"other acts" evidence under UTAH R. EVID. 404; (5) whether attorney fees are recoverable for third-party bad faith cases (yes); (6) whether attorney fees are recoverable for breach of fiduciary duty (yes); and (7) whether litigation expenses are recoverable in third-party bad faith cases (yes).

The law did not support State Farm's condition that this Court agree to vacate its prior opinion, and thus there is no basis to conclude in this case that a settlement proposal conditioned on vacatur was viable. State Farm was in precisely the situation described in *U.S. Bancorp*: It had rolled the dice and lost, and now was hoping that an "unfavorable outcome can be washed away by a settlement-related vacatur." 513 U.S. at 10.

III. THE SUGGESTION THAT SLUSHER COULD HAVE SETTLED HIS INTEREST IN THE CLAIMS AGAINST STATE FARM INDEPENDENT OF CAMPBELLS AND OSPITAL WAS SPECULATIVE AND DID NOT PRECLUDE ENTRY OF SUMMARY JUDGMENT.

Even if this Court were to conclude that the vacatur condition would likely have been satisfied if the plaintiffs had accepted State Farm's offer, appellants still had to prove a likelihood that, but for the actions of Humpherys, State Farm's settlement offer would somehow have been accepted and Slusher would have received one-third of $150,000,000. Appellants try to stretch the speculative chain of causation to include a possibility that State Farm might have entertained separate settlement with Slusher even though such a settlement would not have achieved the vacatur condition that was central to its offer. That possibility, however, is not mentioned in Slusher's counterclaim, which is expressly limited to damages resulting from rejection of the $150,000,000 offer.

Appellants' claims in this case cannot satisfy the "but for" causation standard set forth in Utah law. State Farm's interest in proposing the settlement was to obtain vacatur of the Supreme Court's decision and termination of the litigation. There is no dispute that the settlement State Farm proposed required the concurrence of the Campbells, Slusher, and the Ospitals. Paragraph 3 of the December 7, 2001 Agreement states: ". . . There shall be no settlement of any claim against State Farm without the united approval of the Campbells, the Ospitals and Slusher." Slusher testified this provision of the December 7, 2001 Agreement represented his understanding of the agreement among the parties from 1995 forward. Depo. of Slusher, pp. 55-57. (R. 381-83.)

It is unreasonable to claim, as appellants do, that Humpherys had some enhanced duty to explain what was obvious and already known, especially to Slusher who maintained throughout this case that Scott Barrett was his personal counsel. The agreement that there could be no settlement of any claim against State Farm without the united approval of the Campbells, the Ospitals, and Slusher had the obvious potential to lead to a situation where settlement could not occur because the parties disagreed, and all parties including Slusher testified that they understood and accepted the unanimity requirement. There can be no persuasive argument that the parties did not understand the plain meaning of the document they signed.

Regardless of the parties' agreement, however, the Campbells were the named plaintiffs in the case and so no settlement could have been achieved without their concurrence. The Campbells were emphatically opposed to any settlement that would require vacatur of the Supreme Court's decision. This fact alone rendered impossible any settlement conditioned on vacatur. Mrs. Campbell not only refused to enter into any settlement agreement that involved vacatur, but characterized the offer as "offensive." She felt State Farm "was trying to pay us to keep our mouths shut and to hide what we finally uncovered." Aff. of Inez Campbell, ¶ 9 (R. 466). She also testified that she would not have changed her position based on pleas from Slusher or advice from Barrett. Depo. of I. Campbell, pp. 82-83 (R. 472-473).

Only one person is qualified to state what Mrs. Campbell would have done, and that person is Mrs. Campbell. Knowing everything appellants claim she should have known, *and with the knowledge that her decision resulted in eventual reversal of the $150 million award*, Mrs. Campbell maintains that her decision would have been the same. The Ospitals were also unwilling to agree to vacate the Court's opinion. Their consent was necessary under the agreement the parties had among themselves, which required unanimous consent to any settlement.

Slusher claims that he might have been able to pursue separate settlement negotiations with State Farm and that, as a public company, State Farm would have explored any settlement that had the potential to reduce its liability. The malpractice alleged in the counterclaim, however, was limited to the failure to accept the $150,000,000 settlement offer. Moreover, Slusher's claim is inconsistent with the fact that neither before nor after the United States Supreme Court granted *certiorari* in *Campbell* did such settlement overtures occur. This reinforces the conclusion that the reason for the extraordinary settlement offer was State Farm's desire to erase an unfavorable precedent from the books, and that separate settlement with Slusher, who could not deliver a vacatur, was not viable.

At bottom, appellants' argument is simply that they believe Campbell and Ospitals would have agreed to the settlement if they had only been told that the original Utah Supreme Court opinion, although vacated, nullified, and rendered entirely meaningless, might nevertheless have been available for reading on Westlaw.[8] This argument simply does not answer the concerns that caused Mrs. Campbell and the Ospitals to reject the settlement proposal.

Black's Law Dictionary defines "Vacate" as "[T]o annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment." Vacatur of a court opinion has been characterized as "'rewriting history,' and resulting in decisions that 'vanish,' 'disappear,' or are 'erased,'" S.D. Makar, *Vanishing Precedents: Settlements Vacatur on Appeal*, 68 FLA. B. J. 18 (1994) (citations omitted). It is a process to "destroy decisions and manipulate case law." J.E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 328 (1994). "[O]ne thing is painfully clear about a vacated decision, it might as well not have been drafted in the first place. It is useless to anyone except the original parties and harmful to third parties look-

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[8] Counterclaimants offered no evidentiary support for the proposition that an opinion which is vacated by the issuing court would remain available on Westlaw following vacatur. More likely, the opinion would have been withdrawn from publication. "Both online reporting services [LEXIS and Westlaw] have similar policies to that of West and will usually remove cases that are vacated and do not appear in the official reporters. . . . [V]acatur has the potential to destroy even the informational value of a case by causing it to disappear without a trace." J.E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 351-52 (1994).

ing for the precedential value that the vacated decision may have otherwise provided." W.P. Atkins, *The History and Subsequent Demise of Vacatur Upon Settlement by the Federal Circuit*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 295, 299 (1996).

The fact is that the settlement proposal would have eviscerated the opinion. Mrs. Campbell testified in her deposition that what was important to her was "that the principle of the thing that we had fought for all these years was still intact, that they were going to be exposed." (I. Campbell depo., p. 73, R. 728.) In her deposition, counterclaimants' counsel explained that "vacated" means "taken away like it never happened," and Mrs. Campbell said she understood it the same way. (*Id.* p. 74, R. 728.) Both Campbells and Ospitals felt that they were being asked to "sell out principle for money." (*Id.* pp. 193, 200.)

The foregoing undisputed facts are incompatible with the contention of Slusher and Barrett that, "but for" Mr. Humpherys' alleged failure to disclose the terms of the settlement proposal to Barrett, or to more fully discuss those terms with Slusher, the settlement proposed by State Farm would have been completed. Because this evidence precludes Slusher and Barrett from establishing the critical element of causation in support of their counterclaim, summary judgment on the counterclaim was appropriate.

IV. LEGAL MALPRACTICE CLAIMS SEEKING RECOVERY BASED ON LOST PUNITIVE DAMAGES ARE BARRED AS AGAINST PUBLIC POLICY.

The judgment which State Farm offered to settle was for $1,000,000 compensatory damages and $145,000,000 punitive damages, plus interest. In May 2003, State Farm paid the entire compensatory damage award plus interest, thus compensating the injured parties in full for their losses. The claims in this case therefore are exclusively to recover lost punitive damages. No reasonable person could conclude that the basis of the appellants' alleged loss in this case is anything other than the alleged loss of the award of punitive damages. Those damages were not intended to compensate the plaintiffs, all of whom were made whole and then some. Those damages were intended to punish State Farm. Thus, if the district court were to have ordered Humpherys to pay those damages, the Court would essentially have imposed on Humpherys the punishment that State Farm was ultimately held not required to pay. No social purpose would be served by such a result. In essence, Barrett and Slusher seek to recover from Christensen & Jensen and Humpherys that portion of the punitive damages awarded against State Farm which the United States Supreme Court held unconstitutional and therefore unrecoverable. As a matter of law, legal malpractice claims seeking recovery based on lost punitive damages are barred as against public policy.[9]

Punitive damages are not compensatory. Rather, their purpose is punishment and deterrence of egregious conduct. *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 807 (Utah 1991). The rationale for allowing a plaintiff to retain a portion of a punitive damages award is not compensatory. Rather, it is to provide an incentive to private plain-

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[9] That principle is especially compelling where, as a matter of law, the "lost" punitive damages could not legally have been awarded in the underlying case. As this Court has held, the key consideration in a legal malpractice claim is how a court should have ruled. *Crestwood Cove Apartments Business Trust v. Turner*, 2007 UT 48, ¶ 32. In *Campbell*, the United States Supreme Court and this Court held that punitive damages in excess of $9 million dollars (the amount ultimately awarded) could not lawfully be assessed against State Farm.

tiffs to bring claims that result in deterrence of egregious conduct. *See Wilson v. Oldroyd*, 1 Utah 2d 362, 267 P.2d 759, 766 (1954) ("Such amount does not rest upon any loss suffered by the plaintiff; the compensatory damages are for that purpose. Punitive damages are awarded on the theory that it is permissible in case of certain aggravated wrongs to permit the private litigant, in the public interest, to impose a penalty upon the defendant as a punishment and to deter others from engaging in similar offenses.").

In the case at bar, the *State Farm* plaintiffs were fully compensated for their efforts in deterring State Farm's conduct by receiving their allotted share of the punitive damages the courts ultimately found to represent an appropriate level of punishment for State Farm's wrongdoing. They are entitled to no more compensation than that. The question thus becomes whether in the context of legal malpractice, public policy demands compensation of a client for the loss of an opportunity to recover punitive damages. Allowing legal malpractice plaintiffs to recover "lost" punitive damages from their attorneys does not further the punishment and deterrence goals of punitive damages. The Restatement recognizes the obvious:

> [S]uch recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. h, at 393 (2000).

Because the injured parties have been fully compensated for their underlying losses, and because the purposes of punitive damages are not served by imposing punishment on the lawyers, whose conduct was neither willful, wanton, reckless, nor egregious, public policy prohibits recovery of lost punitive damages as a component of damages for legal malpractice.

In *Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP*, 30 Cal. 4th 1037, 135 Cal. Rptr. 2d 46, 69 P.3d 965 (2003), following a thorough analysis of the issue, the California Supreme Court concluded that "public policy considerations strongly militate against allowing a plaintiff to recover lost punitive damages as compensatory damages in a legal malpractice action." 69 P.3d at 970. In a lengthy analysis, the court went on to articulate several reasons for its decision.

First, the court noted that allowing punitive damage awards in such context was contrary to the purpose of punitive damages. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *see also Crookston*, 817 P.2d at 807.

> Making a negligent attorney liable for lost punitive damages would not serve a societal interest, because the attorney did not commit and had no control over the intentional misconduct justifying the punitive damages award. Imposing liability for lost punitive damages on negligent attorneys would therefore neither punish the culpable tortfeasor, nor deter that tortfeasor and others from committing similar wrongful acts in the future.

69 P.3d at 970. Thus, awards of punitive damages as part of the compensation in a legal malpractice case does not directly further the objectives of punitive damages.

The court also found that an award of lost punitive damages against the lawyers would not indirectly further the deterrent purpose of punitive damages for two reasons. First, those purposes "would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong." *Id.* at 971 (citations omitted, emphasis in original). In this regard, disallowing awards of punitive damages is also consistent with the public policy expressed in UTAH CODE ANN. § 31A-20-101(4), which prohibits shifting responsibility for punitive damages to an insurance company. Second, in the context of a legal malpractice claim the amount of punitive damages bears no relationship to either the culpability of the lawyer or the lawyer's financial resources. "Because an award of lost punitive damages bears no relation to the gravity of the attorney's misconduct or his or her wealth, it cannot further the deterrent purpose behind such damages." 69 P.3d at 971.

The California court cited other reasons for disallowing awards of lost punitive damages. While some of those reasons seem less applicable to the facts of this particular case, it must be remembered that the public policy issue extends beyond this case to the general recoverability of lost punitive damages in such circumstances. The California court noted that the amount of punitive damages is inherently speculative because it depends upon the inherently speculative subjective moral determination of a fact finder. 69 P.3d at 971-72; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53, com. h, p. 393 (an award of lost punitive damages "calls for a speculative reconstruction of a hypothetical jury's reaction"). Further, such an award involves an inherently incomprehensible application of a "standard within a standard," in that the client's burden of proof would be to show by a preponderance of the evidence what a hypothetical jury in the underlying case would have found by clear and convincing evidence. "In light of this complex standard, '[t]he mental gymnastics required to reach an intelligent verdict would be difficult to comprehend much less execute.'" 69 P.3d at 972 (quoting *Wiley v. County of San Diego*, 19 Cal. 4th 532, 544, 79 Cal. Rptr. 2d 672, 966 P.2d 983 (1998)). In addition, allowing such awards "would hinder the ability of trial courts to manage and resolve mass tort actions by discouraging the use of mandatory, non-opt-out punitive damages classes," a situation particularly raised by the *Ferguson* case. 69 P.3d at 972.

Finally, the court concluded that if such awards were allowed there was a potential to increase the cost of legal malpractice insurance coverage, and thus to limit consumer choice in the marketplace for legal services:

> Finally, allowing recovery of lost punitive damages as compensatory damages in a legal malpractice action may exact a significant social cost. Exposing attorneys to such liability would likely increase the cost of malpractice insurance, cause insurers to exclude coverage for these damages, or further discourage insurers from providing professional liability insurance in California. The resulting financial burden on attorneys would probably make it more difficult for consumers to obtain legal services or obtain recovery for legal malpractice.

Id. at 972.

The appellate courts of Illinois and New York have adopted the same position. In *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 856 N.E.2d 389 (2006), the Illinois Supreme Court, after a lengthy analysis, followed *Ferguson*. It held:

> Disallowing lost punitive damages means that plaintiffs in legal malpractice actions may not receive as much money as they might have if the underlying action had been handled properly. Compensating plaintiffs, however, is but one of several factors that must be balanced in assessing whether lost punitive damages should be recognized in legal malpractice actions. There is no reason in logic or the law why it should be given preeminent effect where, as here, the jury has already awarded full compensation to the plaintiff for all the damages it actually sustained.

> Punitive, or exemplary, damages are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future. Allowing Tri-G to recover its lost punitive damages from Burke would not advance that policy in any way. To the contrary, by holding the firm liable for the intentional or willful and wanton misconduct of a third party, it tears the concept of punitive damages from its doctrinal moorings.

856 N.E.2d at 417 (citation omitted). The Appellate Division of the New York Supreme Court, in *Summerville v. Lipsig*, 270 A.D.2d 213, 704 N.Y.S.2d 598 (2000), held that such a claim does not further the purposes of punitive damages: "It would be 'illogical' to hold the law firm liable for causing the loss of a claim for punitive damages which are meant to punish the wrongdoer and deter future similar conduct." 704 N.Y.S.2d at 599.

For the foregoing reasons, this Court should conclude as a matter of law that legal malpractice claims seeking recovery based on lost punitive damages are barred as against public policy, and grant summary judgment against Slusher and Barrett on their counterclaim.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE VALUE OF BARRETT'S CONTRIBUTION TO THE CAMPBELL CASE WAS $25,000.

After numerous pretrial filings, four days of trial, extensive briefing and argument, the trial court weighed all the equities in this case and concluded that Scott Barrett's contribution to the *Campbell v. State Farm* case was worth $25,000. Barrett does not challenge any of the trial court's subsidiary findings of fact. Rather, he challenges the ultimate finding that $25,000 was a fair and equitable award under the circumstances.

A. *Barrett Has Failed to Marshal the Evidence in Support of the Trial Court's Ultimate Finding.*

This Court recently explained the process that a party must follow when appealing a trial court's ultimate finding of fact in an equitable proceeding. *Parduhn v. Bennett*, 2005 UT 22, ¶¶ 24-25, 112 P.3d 495. "Not all findings of fact are created equal," the Court began its analysis. "[S]ome are ultimate findings of fact, upon which the resolution of a particular issue turns, while others are subsidiary facts supporting the ultimate findings." *Id.*, ¶ 24.

In this case, the trial court's ultimate finding was that "$25,000 represents a fair, reasonable and equitable amount fully compensating Barrett for all of the professional services which he rendered in connection with the Campbell case, as well as for the value which he brought and/or added to the case." (R. 2102 ¶ 22.) In order to successfully challenge that finding, Barrett was required to "first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below." *Parduhn*, 2005 UT 22, ¶ 25. The appellant "must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *Id.* (citation omitted). The same requirement applies when the appellant is challenging a subsidiary finding, because "a challenge to a subsidiary finding is really a challenge to the ultimate finding it supports." *Id.*, ¶¶ 25, 32.

Barrett's claim, therefore, that he has "fulfill[ed] Barrett's marshaling burden" by doing nothing beyond paraphrasing the trial court's subsidiary findings is without merit, and the judgment should be affirmed.

B. *The Trial Court Did Not Abuse Its Discretion in Determining the Equitable Relief to Which Barrett Was Entitled.*

Even considered on its merits, Barrett's challenge to the trial court's award does not even come close to demonstrating an abuse of discretion. In this regard, the arguments made by Barrett to the trial court are instructive. In the equitable proceedings, Barrett argued that the court's award should be based upon particular "contributions" to the case. The principal considerations urged by Barrett were the following:

1. Barrett claimed that it was only through his investigation that Curtis Campbell's identity as the third driver involved in the accident was discovered, and that, without his efforts, there would have been no *Campbell v. State Farm.* (R. 1762). That claim was easily debunked, as a written statement by Mr. Campbell had been taken by the Highway Patrol the very night of the accident. (R. 1988.)

2. On behalf of Slusher, Barrett obtained the larger of two underlying auto accident judgments against Curtis Campbell that ultimately generated the bad faith suit, and was the first attorney in the auto accident case to send a policy limits demand to State Farm. (R. 1763 ¶ 6.) Christensen & Jensen did not dispute those contributions.

3. Based on Barrett's advice, Slusher agreed to forebear execution on his judgment, and to cooperate in the pursuit of a lawsuit by Campbell against State Farm. (R. 1762 ¶ 5.) Christensen & Jensen did not dispute that contribution to the origin

of the case. However, as the trial court noted, that arrangement was in Slusher's best interests. "Ultimately, Slusher realized almost $3,000,000.00 from such contractual rights. This was in addition to Slusher's receiving the full amount (including interest) of the personal injury judgment rendered in his favor against Curtis Campbell in the Logan case." (R. 2101, ¶ 19.)

4. According to Slusher, Barrett's continued representation of him was important to Slusher's participation in the bad faith case. Slusher had no complaints about Barrett's performance in the State Farm lawsuit. (R. 1763 ¶ 9; R. 1767 ¶ 24.)[10]

5. Although Barrett started keeping time records in early 1989, he claimed not to have recorded all of his time in the State Farm case because it was a contingency case. (R. 1764, ¶¶ 10-11.) Barrett estimated that he had worked at least 1,050 hours in *Campbell* from 1984 to 2003. (R. 1769, ¶ 31.) Apart from a lack of detail and untimeliness (Barrett first cited this enhanced figure during the equitable proceedings), the bulk of his claimed hours were questionable. For example, although Barrett did not participate in the 1995 or 1996 trials and at times occupied himself by doing crossword puzzles (R. 2136, pp. 491-92, 592), he nonetheless claimed 324.5 billable hours for sitting in the back of the courtroom during the trials, which the trial court found did not materially advance the case. (R. 2136, pp. 493-94; R. 2101, ¶ 17; R. 2000-19.) Christensen & Jensen argued that a more accurate (yet still generous) assessment of Barrett's hours

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[10] Slusher and Barrett continue to enjoy their longstanding relationship, including an apparent agreement to share any recovery in the malpractice suit against Christensen & Jensen and Humpherys. (*See* R. 2316, pp. 582-83.)

was 213.5, and that, at his rate of $100 per hour at the time, only $21,350 should be awarded. (R. 1979-83.)

6. In the 1990s, Slusher became frustrated at a suggestion that Inez Campbell, who had not been a signator to the parties' initial agreement, and who was represented separately by Christensen & Jensen, be added to the agreement. According to Barrett, he convinced Slusher at that time not to retain separate counsel "to represent him against State Farm." (R. 1765-66, ¶¶ 15-23.) As the trial court observed, this contention had little merit. "Very early on (April 3, 1987), the trial court in the *Campbell* case ruled that Robert Slusher (as well as the Ospitals) had no bad faith claims against State Farm and those claims were dismissed with prejudice. . . . Slusher's ability to receive any amount from the *Campbell v. State Farm* case was entirely dependent on the success of the claims of Inez and Curtis Campbell. The ultimate success of the Campbells' claims against State Farm was the result of the financial resources and professional services provided by C&J (with assistance from Lawrence Tribe and his associates). Slusher was obligated to pay C&J the contingency fee attributable to the portion of the Campbell's recovery realized by Slusher, regardless of whether Barrett encouraged him to or not. Slusher was contractually obligated to cooperate with the Campbells and their counsel." (R. 2101 ¶¶ 18-20.)

7. During the State Farm case, "Barrett performed numerous and important services for Slusher," including fielding hundreds of telephone calls from him. (R. 1767.) Christensen & Jensen did not dispute that Barrett had extensive communications with Slusher. Barrett did not afford the same courtesy to the other clients, however.

In fact, one service that he performed for Slusher was to take a position directly adverse to the Campbells in Curtis Campbell's probate, demanding immediate distribution of Slusher's share of the recovery even while a question was pending as to whether the IRS intended to tax the Campbell estate on the entire recovery, which would have bankrupted the estate. (R. 1767-68, ¶ 26; R. 2031-35; R. 2135, p. 443.)

8. Based upon an "interview" with Barrett, expert witness Charles Gruber opined that Barrett had "added considerable value to the representation of the client group and to Slusher individually," and should receive one-third of the total recovery for his efforts. (R. 1770, ¶ 33; R. 1929, ¶ 4.) Having heard all the evidence at trial, however, the trial court was aware that Barrett's version of events was unreliable.

9. At oral argument, Barrett's counsel also urged the trial court to take into account the "disdain for civility and lack of respect for Mr. Barrett" and "departures from the notions of civility and fairness" allegedly shown by Christensen & Jensen at the trial. (R. 2138, pp. 21-22.) The trial court rejected this characterization, stating, "There is no substance to the claims in oral argument or in the briefs that Christensen & Jensen and/or its attorneys acted inappropriately toward Barrett, rather they acted with professionalism and civility in a difficult case." (R. 2088.)

At the conclusion of oral argument, Judge Hanson indicated that he would weigh the circumstances carefully and reach a decision: "I'll take a look at this and I'll come up with what I believe to be a fair amount for fees that I believe Mr. Barrett is due for the work that he performed, not only the work that he performed but whatever else goes into that calculation that are intangibles," he stated. "And will it be perfect? No, but I'll do the best I can. I hope that over 24 years I've developed some idea of what's fair under the circumstances . . . ." (R. 2138, pp. 44-45.)

He did just that, rejecting the figures proffered by both parties, and independently concluding that Barrett should receive $25,000. On appeal, Barrett objects to the award on two grounds. His first argument is that the trial court "failed to show that the $25,000 award flows logically from the evidence." (Brief of Appellant, p. 45.) This contention is difficult to comprehend, because nearly all of the considerations urged by Barrett below were intangible. (R. 1771.) When the amount of an equitable award hinges largely on intangibles – which are, by definition, unquantifiable – how can a party complain that the court did not assign a dollar value to each of his subsidiary findings? (See Brief of Appellant, p. 46 ("Without any individuation as to what each subsidiary finding is worth it is likewise impossible for Barrett to properly challenge these findings").)

Barrett's contention conflicts with this Court's pronouncements regarding the role of a court when exercising its equitable powers. "A court acting in equity is not required to recite its decision in terms of specific factors or to adhere to formulaic tests. Rather, its obligation is to effectuate a result that serves equity given the overall facts and circumstances of the individual case." *Hughes v. Cafferty*, 2004 UT 22, ¶ 24, 89 P.3d 148. Because equitable determinations are based on the overall facts and circumstances of a case, "it is appropriate to give considerable deference to the trial court," who is in "the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole . . . ." *Id.*, ¶ 24 n.2.

Barrett's implication that Judge Hanson was required not only to articulate every piece of evidence from a four-day trial that he considered but also to ascribe a value to it defies the very nature of equitable relief. This Court observed in *Hughes*:

> The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rule which govern their use. Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, and their adaptability to circumstances. The court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

Id., ¶ 26 (quoting 1 Spencer W. Symons, POMEROY'S EQUITY JURISPRUDENCE § 109 (5th ed. 1941) (court's ellipse and brackets omitted).

The trial court fashioned an equitable remedy that it considered fair and reasonable based on the overall circumstances of the case, the evidence at trial, and a quarter century on the bench. Barrett's brief provides no basis for finding that the court abused its discretion.

In his second argument on appeal, Barrett argues that the trial court erred "by using an incorrect equitable standard of legal measure and by completely ignoring C & J's and Barrett's agreed upon and stated intent—appearing in the October 10, 1990 Agreement between LRH and Barrett—to 'equitably' share the fees based upon 'the present posture of the case' and their 'respective involvements' on a 1/3-2/3 basis in favor of C & J rather than 50-50." (Brief of Appellant, p. 47.)

This argument is rather perplexing, considering that both the jury and the trial court found that Barrett had failed to perform his obligations under that very agreement. While Barrett correctly notes that a trial court may rely on contracts, valid or invalid, as evidence of parties' intent, *Parduhn*, 2005 UT 22, ¶ 34, the contract in *Parduhn* was unenforceable on technical grounds (loss of an insurable interest upon dissolution of a partnership), not because of the complaining party's own breach. *See id.* at ¶ 5.

Barrett's argument is nothing more than an attempt to reargue his case, which has already been rejected by the jury and the trial court, and which is improper at this stage of the case. Moreover, Barrett has again failed to marshal the evidence supporting the trial court's findings on this issue, justifying affirmance on that ground alone.

CONCLUSION

Appellees request that this Court affirm the judgment of the district court.

DATED this 28 day of June, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEES were served by U.S. Mail on June 28, 2007 as follows:

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